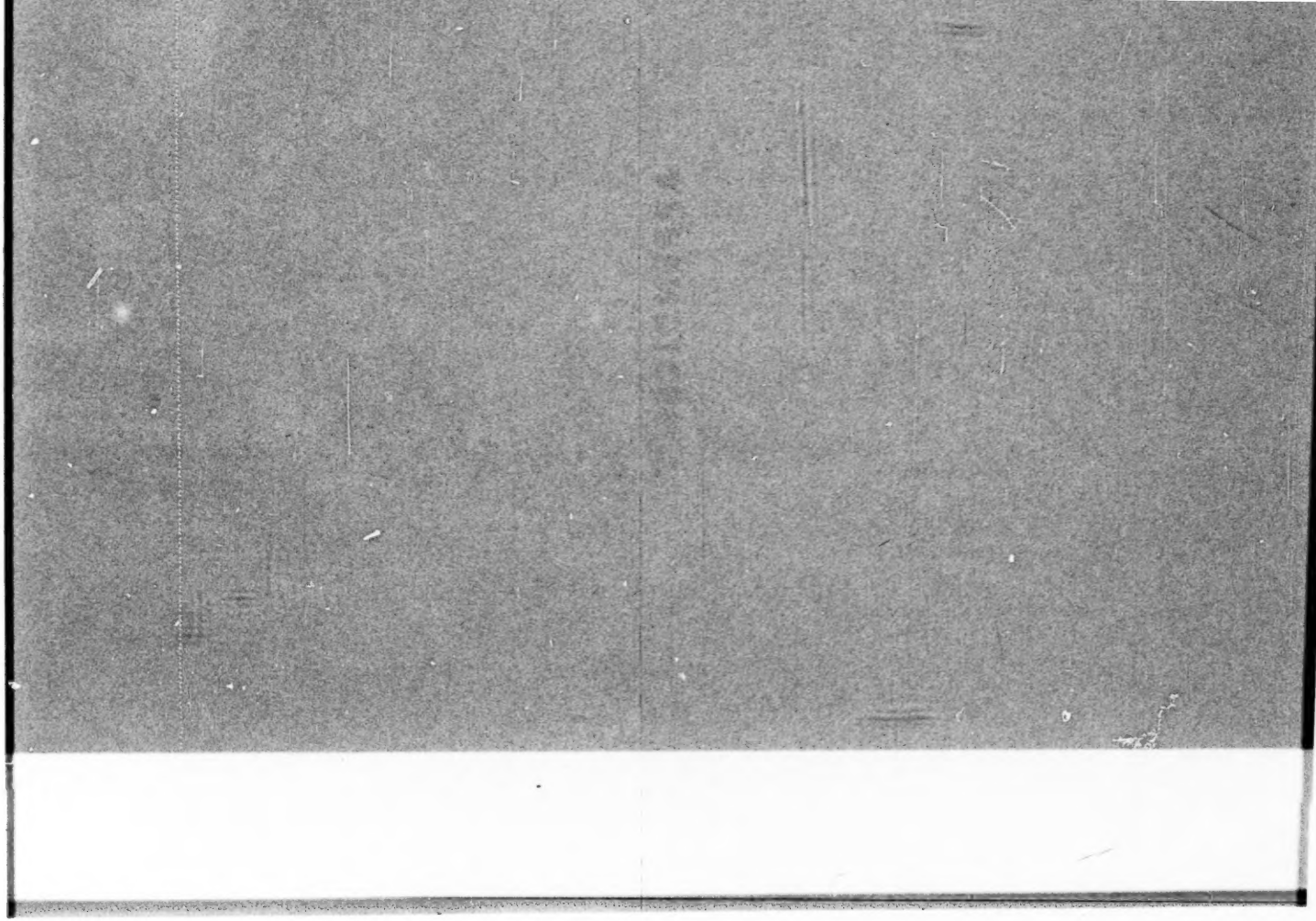

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

OPINION SUSTAINING MOTION TO DISMISS

On May 12, 1972, Mohasco Industries, Inc., and three subsidiary corporations, all incorporated in the State of New York, filed their action against sixteen motor carriers, at least five of which are residents of the State of Mississippi, seeking restitution of certain tariff rate payments plaintiffs made between January 1, 1968 and December 18, 1970, limited to the excess between the rates existing prior to January 1, 1968 and the proposed rates which were cancelled by the Interstate Commerce Commission, effective December 18, 1970.[1] The total amount claimed is $172,258.94, but only four defendants are each charged with an amount in excess of $10,000.00.

Jurisdiction is founded on diversity of citizenship and the requisite amount in controversy under 28 U.S.C. #1332, and, alternatively, on the existence of a federal question in that the matter involves an Interstate Commerce Commission order and arises under an Act of Congress regulating commerce, 28 U.S.C. #1337. No issue as to venue has been posed.

Plaintiffs charge that defendants, through their agent, published and filed with the I.C.C. new tariffs on less than truckload shipments of various kinds of furniture, effective January 1, 1968. Shortly prior to the effective date, and in response to shipper protests, including at least one of the plaintiffs, I.C.C. began an investigation of the proposed tariffs which remained in effect

[1] A footnote in defendants' brief indicates the correct interval is January 16, 1968 to December 18, 1970.

during the period of investigation, no stay order having been issued by I.C.C. By order, effective December 18, 1970, I.C.C. required defendants to cancel the increased charges upon the ground that the carriers had failed to meet their statutory burden showing that the new rates were just and reasonable." The carriers made no appeal from this order and complied with the cancellation. Plaintiffs claim that the new rates increased, by fifty percent or more, the charges applicable, which plaintiffs paid during the nearly three year I.C.C. investigation, and that they are entitled to restitution of the increase. Plaintiffs equate "not shown to be just and reasonable" with unlawful, and, the proposed tariffs being unlawful, the only lawful rates were those in effect prior to January 1, 1968. Plaintiffs rely on the reasoning in *Middlewest Motor Freight Bureau, et al* v. *United States of America*, 433 F. 2d 212, and *Admiral-Merchants Motor Freight, Inc. et al* v. *U.S.A. and I.C.C.* 321 F. Supp. 353, and cases stemming therefrom. All defendants, except Acme Fast Freight, Inc., have appeared and filed a motion to dismiss on the grounds that the complaint fails to state a claim against defendants upon which relief can be granted.

Pre-hearing briefs, as well as post-hearing briefs have been furnished the court after oral argument. At the hearing the Court raised questions as to its jurisdiction, responses to this issue being included in the post-hearing briefs.

As to jurisdiction, plaintiffs claim that, under F.R.C.P. Rule 20, diversity of citizenship being present, and, as claims against four of the defendants each exceed the jurisdictional amount, they are permitted to join all defendants in one action for the purpose of promotion trial convenience and in avoidance of multiple lawsuits. Defendants claim that where there are four plaintiffs, each having a separate corporate identity, it is es-

sential that the demand of each be of the requisite jurisdictional amount, citing *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U.S. 39, at 40-41, and further from *Eagle Star Insurance Co.* v. *Maltes*, 313 F. 2d 778, wherein the Fifth Circuit Court of Appeals held:

"Thus the Supreme Court has evinced a desire to give a strict construction to allegations of the jurisdictional amount in controversy, so as to allow aggregation only in those situations where there is not only a common fund from which the plaintiffs seek relief, but where the plaintiffs also have a joint interest in that fund, such that if plaintiffs' rights are not affected by the rights of co-plaintiffs then there can be no aggregation. . . . In other words, the obligation to the plaintiffs must be a joint one."

Defendants claim that it does not appear from the complaint that the claim of any one plaintiff against any one defendant exceeds the jurisdictional amount, and that obviously there is no joint obligation. The Court is not sure that it can accept this argument. The complaint reveals that all four plaintiffs claim the sum of $72,-477.02 against defendant Merchants Truck Line and the sum of $40,891.96 against Beard Truck Line. Obviously, at least one or more plaintiffs has a claim against either of those defendants in excess of the statutory minimum, and, as to those plaintiffs, diversity jurisdiction is established. The Court would be reluctant, however, even if the pleadings are reformed by setting out the claim of each plaintiff separately, to consider the remaining claims under pendent jurisdiction.

As to jurisdiction under 28 U.S.C. #1337, plaintiffs concede that their action is a common law claim for restitution under the savings clause of Section 216(j) of the Interstate Commerce Act, 28 U.S.C. #316(j). As pointed out by defendants in *Bela Seating Co., et al* v. *Advance*

Transportation Co., et al., 344 F. Supp. 854, a district court held that it would possess no jurisdiction over a common law restitution action brought by shippers for refund of certain freight charges from motor carriers, where neither diversity of citizenship nor the jurisdictional amount was pleaded. Also see *Pensick & Gordon, Inc.* v. *California Motor Express*, 323 F. 2d 769, wherein the court restricted further proceedings, grounded solely in common law rights, to the plaintiff and those defendants as to whom there was the requisite diversity.

Although the Court has doubts over its diversity jurisdiction as claimed in the present form of the complaint, it has no doubt but that the action should be dismissed for failure to state a claim upon which relief can be granted. In support of its motion to dismiss, defendants rely primarily on a district court decision of May 12, 1972, in *U.S.A.* v. *Associated Transport, Inc., et al.*, 347 F. Supp. 650, which involved an action by the government to recover an increase in the freight charges defendants assessed, and the U. S. paid, for transportation of furniture in interstate commerce at various times between May 6, 1969 and December 18, 1970. A motion to dismiss was granted. As in the case sub judice, protests against the increases were filed with I.C.C. and it was requested to exercise its authority under Section 216(g) of the Act to suspend the effectiveness of the increases and make a formal investigation of their reasonableness. As here, I.C.C. refused to suspend the increase and permitted the rates to become effective January 16, 1968. As a result of its investigation and hearing, I.C.C., on November 17, 1970, found that the changed classifications on furniture were "not shown to be just and reasonable" and ordered their cancellation on or before December 18, 1970 with which order of cancellation the carriers complied, re-instating the tariffs that had been in effect prior to January 16, 1968. In that

case, as plaintiffs claim here, plaintiff claimed that the finding that the increased ratings were "not shown to be just and reasonable" means that they were never lawful and therefore plaintiff was entitled to restitution. In that case, plaintiff, as do plaintiffs here, relied on *Middlewest Motor Freight Bureau, et al* v. *U.S.*, 433 F. 2d 212. The Court in Associate carefully analyzed the Middlewest decision, and found that it did not support plaintiff's claim. Middlewest allowed a recovery for only that portion of the time that the I.C.C.'s cancellation order was under a court-ordered temporary suspension, and the court in Associate found that language in Middlewest otherwise supported the contentions of the defendant. In Associate, the court ruled that it could not grant recovery of that part of the freight charges collected by the defendant from January 1, 1968 to December 18, 1970, which exceeded the prior rates absent a finding by the I.C.C. that the excess was unjust and reasonable and a *further findings as to what rates would have been just and reasonable* during the interval. This Court agrees with the decision in Associate and its interpretation of the limited relief allowed in Middlewest. In Middlewest, the appellate court was confronted with whether a rate that is not shown to be just and reasonable is lawful, and concluded that it was. However the appellate court was quick to specifically point out that this conclusion did not imply that the tariffs were unlawful prior to the I.C.C. final order of cancellation, as that issue was not before the appellate court. Restitution in Middlewest, as stated above, was ordered for only the period the cancellation order was temporarily restrained by a lower court.

Plaintiffs, here, also rely on *Admiral-Merchants Motor Freight, Inc.* v. *U.S.*, 321 F. Supp. 353, aff'd without opinion, 404 U.S. 802, reh. den. 404 U.S. 987, and cases stemming therefrom, such as *U.S.A.* v. *Burlington Truck*

Line, Inc., Cause No. 19, 359-4, D.C. of Mo., Western Division, March 1, 1973, and *The Procter and Gamble Company, et al* v. *Byers Transportation Company, Inc., et al*, Cause No. 18,829-4, D.C. of Mo., Western Division, February 22, 1973. In Admiral-Merchants, motor carriers sought a review of a decision and order of I.C.C. cancelling increased tariffs. The increased rates became effective on April 1, 1968. Following protests, the I.C.C. ordered an investigation but did not suspend the new rate schedule. Prior to a hearing, respondents thereto, including plaintiffs seeking the judicial review, requested a 90 day delay in the hearing. In response, the I.C.C. issued an order postponing the hearing, conditioned upon respondents' refunding the increased tariffs to the extent that the increases or any portion of them were not approved. On June 5, 1969, I.C.C. found that the increased rates were "not shown to be just and reasonable," and further ordered that the respondents refund the increased amounts as earlier ordered. The three-judge court found that the refund requirement in return for a postponement of the hearing was a procedural matter, saying: "But in the present case the Commission did not undertake to apply substantive common law or equity principles. The matter with which it was concerned, that is the granting of an extension of time, was pure procedural." The Court affirmed the order, additionally finding that the respondents were estopped from complaining about the order when they evidenced willingness to go along with the condition imposed, and that the respondents also waived any objection to it. This decision was affirmed by the Supreme Court without an opinion, and a petition for a rehearing was denied. Two cases referred to above, stemming from this decision, hold that the decision in Admiral-Merchants is res judicata to the defendants in those cases. Clearly, Admiral-Merchants and the decisions growing out of it are not applicable here. Accordingly, the Court finds that the

motion to dismiss should be granted as to all defendants, including Acme Freight, without prejudice to the plaintiffs.

An appropriate order may be submitted with costs assessed to plaintiffs.

DAN M. RUSSELL, JR.
United States District Judge

Dated: 19 April 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 72J-92(R)

ORDER SUSTAINING MOTION TO DISMISS

This cause having come on for hearing on motion to dismiss filed by Arkansas-Best Freight System, Inc., Beard Truck Line, Clark Truck Line, Crouch Bros., Inc., East Express, Inc., Hennis Freight Lines, Inc., McLean Trucking, Merchants Truck Line, Pacific Intermountain Express, Pic-Walsh Freight Co., Robinson Truck Line, Shumpert Truck Line, Spector Freight System, Inc., Springmeier Shipping Company, and Universal Carloading & Distributing Co., Inc., they being all of the defendants named in the complaint except Acme Fast Freight, Inc., and the Court, after having heard and considered the motion to dismiss filed by said defendants, including oral arguments of counsel and written briefs filed herein, is of the opinion that said motion to dismiss should be sustained as set forth in the Court's written opinion dated April 19, 1973, which opinion of the Court is hereby specifically referred to and is to be considered a part of this order as though wholly written out herein;

It is therefore ordered and adjudged that said defendants' motion to dismiss be and the same is hereby sustained and this case is hereby dismissed without prejudice to the plaintiffs as to all defendants, including

Acme Fast Freight, Inc., and all costs are assessed against the plaintiffs.

ORDERED AND ADJUDGED, this April 26th, 1973.

DAN M. RUSSELL, JR.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2383

MOHASCO INDUSTRIES, INC., *et al.*,
Plaintiffs-Appellants,
v.

ACME FAST FREIGHT, INC., *et al.*,
Defendants-Appellees.

April 1, 1974

* * * *

Richard W. Dortch, Jackson, Miss., Richard J. Hardy, Thomas A. Phemister, Washington, D. C., Michael P. Regan, Amsterdam, N. Y., for plaintiffs-appellants.

Bryce Rea, Jr., Patrick McEligot, Washington, D. C., Junior O'Mara, Jackson, Miss., for all defendants-appellees except Acme Fast Freight.

Samuel Weiner, New York City, for Acme Fast Freight, Inc.

Before COLEMAN, CLARK and GEE, Circuit Judges.

COLEMAN, Circuit Judge:

Plaintiffs-appellants, Mohasco Industries, Inc., and its subsidiaries, Chromcraft Corporation, Futorian Corporation, and Monarch Furniture Corporation, sued the defendants-appellees,[1] motor freight carriers, for restitution

[1] Acme Fast Freight, Inc., Arkansas Best Freight System, Inc., Beard Truck Line, Clark Truck Line, Crouch Brothers, Inc., East Express, Inc., Hennis Freight Lines, Inc., McLean Trucking, Merchants Truck Line, Pacific Intermountain Express, Pic-Walsh

of excess freight charges collected between January 16, 1968 and December 18, 1970. Upon motion, the complaint was dismissed for failure to state a claim upon which relief could be granted. We affirm.

The National Motor Freight Classification, of which the defendant motor carriers are members, published increased freight rates, effective January 1, 1968, for less-than-truckload shipments of many items of furniture. Protests were immediately registered by the furniture manufacturers, shippers, and dealers. Prior to the effective date, the Interstate Commerce Commission of its own initiative undertook an investigation of the reasonableness of the proposed new rates. The rates, however, were not suspended by the Commission pending the investigation, thus permitting them to take effect on January 16, 1968.

The Interstate Commerce Commission proceedings culminated in a finding by the hearing examiner that the increased rates had not been shown to be just and reasonable. In an order issued January 13, 1969, the examiner directed cancellation within thirty days. This order was stayed pending review by a Commission Review Board. The Board sustained the hearing examiner and ordered the rates cancelled by June 13, 1969. Again, this order was stayed while the motor carriers petitioned for reconsideration. Finally, on November 2, 1970, the Commission *en banc* held that the proposed changes were not shown to be just and reasonable, Classification Ratings on Furniture, 1970, 337 ICC 709. The Commission then ordered the increased rates cancelled by December 18, 1970. In compliance with that order, the carriers reinstated the rates which had been in effect immediately prior to January 16, 1968.

Freight Company, Robinson Truck Line, Shumpert Truck Line, Spector Freight System, Inc., Springmeier Shipping Company, Universal Carloading and Distributing Company.

On May 12, 1972, eighteen months after the old rates had been placed back in effect, plaintiffs-shippers filed suit in the District Court for the Southern District of Mississippi for restitution of the excess charges collected between January 16, 1968 and December 18, 1970. It was alleged that since the increased rates had not been shown to be just and reasonable, they were necessarily unjust and unreasonable from their inception, hence unlawful under the Interstate Commerce Act prohibiting unjust and unreasonable charges.[2] It was further alleged that the carriers had an equitable obligation to refund the amounts collected in excess of the once existing and subsequently reinstated rates. This amounted to $172,258.94.

The defendants-motor carriers moved to dismiss, asserting that the complaint failed to state a claim upon which relief could be granted. Looking to United States v. Associated Transport, Inc., D.D.C., 1972, 347 F.Supp. 650, as authority for its decision, the District Court granted the motion. This appeal followed.

On August 9, 1935, Congress enacted Part II of the Interstate Commerce Act, 49 U.S.C. § 301 et seq., commonly referred to as the Motor Carriers Act of 1935. Prior to this enactment, there had grown up a considerable body of common law supporting a shipper's right to *restitution* for unjust, unreasonable, and therefore excessive charges, Arizona Grocery Company v. Atchinson, T. & S. F. R. Company, 1931, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348; Arkadelphia Milling Company v. St. Louis S. W. R. Company, 1919, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517; Baltimore & O. R. v. United States, 1928, 279 U.S. 781, 49 S.Ct. 492, 73 L.Ed. 954; Atlantic

[2] Section 216(a) of the Act. 49 U.S.C. § 316(a), imposes upon motor carriers a duty to establish just and reasonable rates; Section 216(d), 49 U.S.C. § 316(d), prohibits any unjust and unreasonable charge and declares such charges to be unlawful.

Coastline R. R. Company v. Florida, 1935, 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451.

Until 1959 many considered that this common law right of recovery had survived the enactment of Part II of the Interstate Commerce Act by reason of its "savings clause", 49 U.S.C., § 316(j);[3] Barrows Porcelain and Enamel Company v. Cushman Motor Delivery Company, 1939, 11 M.C.C. 365; Bell Potato Chip Company v. Aberdeen Truckline, 1944, 43 M.C.C. 237.

This view fell prey to a total reversal on May 18, 1959, when the Supreme Court decided T. I. M. E. Incorporated v. United States, 359 U.S. 464, 79 S.Ct. 904, 3 L. Ed.2d 952. As stated by the Supreme Court, the question in *T. I. M. E.* was:

> "Can a shipper of goods by a certificated motor carrier challenge in post-shipment litigation *the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment*?" [emphasis added.]

Although by a 5-4 vote of the Court, the answer was, "no". The common law remedy of restitution had not survived the enactment of the Motor Carriers Act of 1935, 49 U.S.C. § 301 et seq.; the "savings clause", Section 216(j) of the statute, 49 U.S.C., § 316(j), mandated no different result.

Hewitt-Robins, Incorporated v. Eastern Freight-Ways, Inc., 1962, 371 U.S. 84, 83 S.Ct. 157, 9 L.Ed.2d 142, was a case challenging a carrier's misrouting practices, not the "reasonableness" of rates. The Court allowed an action to proceed for common law recovery of sums paid because of misrouting, but it went to great pains to

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[3] 49 U.S.C. § 316(j):

"Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

assert and reassert that the decision in *T. I. M. E.* stood unaltered and unreversed.

From the foregoing we are convinced that from and after the decision in *T. I. M. E.*, unless Congress by statute should direct to the contrary, the shipper had no remedy in the courts on common law principles by which he could sue, after the fact, for the restitution of charges collected by motor carriers on tariffs duly filed with and left in effect by the Interstate Commerce Commission.

It necessarily follows that should Congress act in the premises, its enactments would provide the sole and exclusive remedy for excessive charges.

In 1965, Congress did act. It enacted the following statute:

> "§ 304a. Actions for recovery of charges; limitation of actions, definition; effective date; action by or against United States
>
> * * * *
>
> "(2) For recovery of reparations, action at law shall be begun against common carriers by motor vehicle subject to this chapter within two years from the time the cause of action accrues, and not after, and for recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this part within three years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.
>
> * * * *

"(5) The term 'reparations' as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section 316(e) of this title, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

"(6) The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

"(7) The provisions of this section shall apply only to cases in which the cause of action may accrue after June 29, 1949."

P.L. 89-170, 79 Stat. 651, 49 U.S.C. § 304a.

It is at once apparent that Congress did not alter or expand the "savings clause", 49 U.S.C., § 316(j).

Thus, the shippers in the instant case had available no relief other than that afforded by the 1965 enactment.

The instant appeal, however, is not concerned with "reparations" under the Act of 1965.

"Plaintiffs chose to pursue restitution, rather than following the then still-available course of an action at law for 'reparations' under Section 204a which offered the possibility of partial recovery for shipments delivered within two years prior to filing such an action."

Appellant's original brief, page 6.

It is strongly urged that *T. I. M. E.* has been "greatly eroded" by the impact of subsequent court decisions. The trouble with this argument is that none of these were decisions of the Supreme Court of the United States. These cases, and others pending which have been brought

to the attention of the Court, indicate the existence of an organized move to have *T. I. M. E.* reversed. If that is to happen, it will have to be done by the Supreme Court, not by any of the inferior courts.

Moreover, we consider such cases as Middlewest Motor Freight Bureau v. United States, 8 Cir., 1970, 433 F.2d 212, to be inapposite.

In *Middlewest* the shippers sought recovery only for the period when a temporary restraining order was in effect, subsequent to an order of the Interstate Commerce Commission. Here, plaintiffs specifically seek recovery of excess payments from the very time the objectionable rates were first initiated.

The judgment of the District Court is

Affirmed.

APPENDIX C

TEXT OF RELEVANT SECTIONS OF THE MOTOR CARRIER ACT

ACTIONS FOR RECOVERY OF CHARGES; LIMITATION OF ACTIONS

SEC. 204a. [*June 29, 1949, August 26, 1958, September 6, 1965.*] [*49 U.S.C. § 304a.*] (1) All actions at law by common carriers by motor vehicle subject to this part for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(2) For recovery of reparations, action at law shall be begun against common carriers by motor vehicle subject to this part within two years from the time the cause of action accrues, and not after, and for recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this part within three years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(3) If on or before expiration of the three-year period of limitation in paragraph (2) a common carrier by motor vehicle subject to this part begins action under paragraph (1) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(4) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(5) The term "reparations" as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section (216 (e) of this part, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

(6) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

(7) The provisions of this section shall apply only to cases in which the cause of action may accrue after the date of the enactment of this section.

(8) The provisions of this section 204a shall extend to and embrace all transportation of property or passengers for or on behalf of the United States in connection with any action brought before any court or by or against carriers subject to this part: *Provided, however,* That with respect to such transportation of property or passengers for or on behalf of the United States, the periods of limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpayment of such charges, or (C) deduction made under section 322 of the Transportation Act of 1940 (49 U.S.C. 66), whichever is later.

* * * *

Sec. 216(d) All charges made for any service rendered or to be rendered by any common carrier by motor ve-

hicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * *

(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unrea-

sonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the pupose of removing discrimination against interstate commerce or for any other purpose whatever.

* * * *

(f) Whenever, after hearing, upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation in interstate or foreign commerce of passengers or property by common carriers by motor vehicle or by such carriers in conjunction with common carriers by railroad and/or express, and/or water are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge

was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers, in accordance with the order, from the date of filing the complaint or entry of order of investigation or such other date subsequent as the Commission finds justified and, in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

* * * *

(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may

from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided*, That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

* * * *

(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

TARIFFS OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 217. [*August 9, 1935, amended September 18, 1940.*] [*49 U.S.C. § 317.*] (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between

points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

Note.—Comparable provisions, part I § 6(1) (schedules, filing, contents); § 6(6) (form prescribed, rejected schedules void); § 6(9) (rejection, defective schedules); part III, § 306(a) (tariffs, filing, contents); § 306(b) (rejected tariffs); part IV, § 405(a), (b).

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs; *Provided*, That the provisions of section 1(7) and 22[1] of part I

[1] By act of Sept. 18, 1940, § 22 (1) was changed to § 22, as above stated. By act of Aug. 31, 1957, 71 Stat. 564, the "(1)" was reinstated, and paragraph (2) was added to § 22, quotations or tenders of rates, fares, charges, for transportation for the Government.

Served November 17, 1970

30532

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. 34922

CLASSIFICATION RATINGS ON FURNITURE

Decided November 2, 1970

On reconsideration, changed less-than-truckload ratings on numerous furniture items found not shown to be just and reasonable. Schedules ordered canceled, and proceeding discontinued.

Donald E. Cross, Charles A. Moran, Jr., and *Bryce Rea, Jr.*, for respondents and intervener in support of respondents.

Arthur A. Arsham, G. R. Arvedson, John F. Bohman, John H. Caldwell, John M. Cleary, William Davidson, John F. Donelan, Robert B. Einhorn, Olay Ekrom, Jay D. Harris, Clyde E. Herring, Calhoun E. Jacobson, William C. Keenan, Hart J. Manlin, Edward A. McCabe, Marvin H. Morse, John W. Pettit, H. I. Power, Leonard M. Shinn, Fred H. Tolan, and *Charles A. Washer* for protestants.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

GRESHAM, *Commissioner*:

In the prior decision and order (not printed) Review Board No. 4 affirmed and adopted, with the omission of

a discussion of certain cost evidence, the report and recommended order of an examiner, dated December 17, 1968, which found that changed less-than-truckload (LTL) classification ratings on numerous items of furniture were not shown to be just and reasonable, and required their cancellation. By an order dated August 6, 1969, Division 2, Acting as an Appellate Division, denied the respondents' and intervener's joint petition for reconsideration and oral argument. By an order dated September 9, 1969, the Commission granted the respondents' petition for a determination that this proceeding involves an issue of general transportation importance. Thereafter, upon the joint petition of the respondents and the intervener for reconsideration and oral argument, the proceeding was reopened for reconsideration on the present record, and oral argument was denied. The facts will be restated to the extent deemed necessary. Portions of the examiner's report containing more detailed factual data are reproduced in slightly edited form in the appendix hereto. We find the examiner's statement thereof accurate and, as supplemented herein, adopt it as our own.

By schedules[1] filed to become effective on January 1, 1968, the respondents, about 5,500 motor carrier parties to the National Motor Freight Classification, proposed changes in the LTL ratings on 9,419 items of furniture. The changes apply on about one fourth of the approximately 200 descriptions of furniture in the classification. Upon protest by furniture manufacturers, shippers, and dealers located throughout the United States,[2] the pro-

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[1] The schedules under investigation are published in Supplement 21 to National Motor Freight classification tariff A-9, MF-ICC 9.

[2] The protestants are Alladin Prastics, Inc., American Retail Federation, Atlanta Freight Bureau, Association of School Business Officials, Authentic Furniture Products Co., Business Equipment Manufacturers Association, Carlson Furniture Industries, Douglas

posal was placed under investigation but the ratings were permitted to become effective; nevertheless they will be referred to herein as the proposed ratings. Although the protests were confined to the proposed increased ratings, all of the changed ratings were placed under investigation. The National Classification Committee intervened in support of the respondents and introduced most of the evidence in their support.

The proposed ratings are based exclusively on the factor of shipping density, as set forth below:

TABLE 1

Density (pounds per cubic foot)	*Less-than-truckload ratings (class)*
Less than 2.00	350
2.00 to 2.99	300
3.00 to 3.99	250
4.00 to 4.99	200
5.00 to 5.99	175
6.00 to 6.99	150
7.00 to 7.99	125
8.00 to 8.99	110
9.00 to 10.49	100
10.50 to 11.99	92.5
12.00 to 13.49	85
13.50 to 14.99	77.5
15.00 or more	70

Overall, the proposed ratings result in 72 increases and 5 reductions in the prior ratings. In addition, the

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Furniture of California, Inc., Furniture Manufacturers Association of California, General Services Administration, Metalcraft Products Co., National Association of Bedding Manufacturers, National Association of Furniture Manufacturers, National Furniture Traffic Conference, Inc., National Kitchen Cabinet Association, National Office Products Association, National School Supply & Equipment Association, New Jersey Furniture Association, Northwest Furniture Manufacturers Association, Outdoor and Casual Furniture Traffic League, Southern Furniture Manufacturers Association, Southern Retail Furniture Association, Steel Office Furniture Traffic Association, Toy Manufacturers of America, Inc., Virco Manufacturing Corporation, and Virtue Bros. Manufacturing Company.

proposed schedules include seven new commodity descriptions which result in four increased ratings and three reduced ratings. The proposed schedules eliminate certain differences in ratings based on the type of packaging, thereby producing nine additional rating reductions. Typical examples of the proposed increases in classification ratings are set forth below:

TABLE 2

Classification description	Prior rating	Proposed rating	Increase
Wooden and case goods	*Class*	*Class*	*Percent*
Beds or bed ends, wooden or padded, SU or KD.	100	125	25
Bookcases, other than sectional, not nested	125	175	40
Buffets, china closets, sideboards, hutches, credenzas, et cetera, SU.	125	175	40
Dressers, chest of drawers, bureaus, highboys, lowboys, et cetera, SU.	100	150	50
Nightstands, chifforobes, commodes, et cetera, SU.	100	150	50
Cabinets, music record, phonographs, et cetera, SU.	125	150	20
Cabinets, storage or wardrobe and kitchen cabinets, SU.	125	175	40
Chairs, wooden, SU:			
School or cafeteria with arms	200	300	50
School or cafeteria, arms off	125	175	40
Finished, not upholstered, (8F)	200	300	50
Cribs, cradles, or playpens, wooden, KD	85	100	18
Desks, wooden, SU, with drawers	125	175	40
Desks, wooden, SU, without drawers	150	200	33.3
Racks, book or magazine, SU, wooden	100	300	200
Tables, dressing or toilet, wooden, SU	100	175	75
Tables, coffee, et cetera, SU, wooden	150	200	33.3
Tables, wooden, KD (legs off)	85	100	18
Upholstered goods			
Davenports, sofas, lounges, et cetera, SU, upholstered.	175	250	43

Classification description	Prior rating	Proposed rating	Increase
Upholstered goods	*Class*	*Class*	*Percent*
Dual purpose sofa bed and sleeping mechanism.	125	175	40
Chairs, overstuffed, SU, in cartons	175	300	71
Chairs, upholstered or rocker types, SU (7F)	175	300	71
Chairs, revolving, SU, upholstered	150	250	66.7
Ottomans or foot stools, SU, upholstered	125	200	60

The ratings on furniture in the classification first published by the respondents in 1936 remained essentially unchanged until 1958 when alternating truckload ratings were established. In 1962, about 40 LTL ratings on furniture were increased, and the use of packages, known in the rail classification as F packages, was authorized. Despite those increased ratings, individual respondents informed the National Classification Board, an adjunct of the National Classification Committee, hereinafter called the Board, that they were not satisfied with the rating levels on most articles of furniture. During 1965, one of the respondent motor carriers filed a proposal with the Board under which all LTL ratings on furniture would be canceled and replaced by ratings based on the packaged density of furniture articles as tendered for shipment. The proposed ratings ranged from class 400 on furniture with a density of less than 2 pounds to class 100 on furniture with a density of 12 pounds or more. The Board held public hearings throughout the United States on the foregoing proposal. Much shipper opposition to the density basis for the ratings was encountered, and the Board therefore determined to obtain more current information on the transportation of furniture. The two traffic studies described below were the result.

Nationally there are more than 5,000 manufacturers of household furniture, exclusive of producers of office, church, and school furniture. Of these, the Board sent questionnaires to 239 producers, of which 71 replied. The Board also obtained density information from the National Furniture Traffic Conference, Inc. (the Conference), which obtained the data from 45 other furniture manufacturers. Thus, a total of 116 shippers provided the density data. With few exceptions, those 116 shippers were located east of the Mississippi River, including several in New England. In his recommended report, the hearing examiner criticized the study because the shippers were not geographically representative and the selection did not reflect random sampling, volume of production, or type of furniture produced.

The second traffic study is based on information gathered shortly after the proposed ratings became effective on January 16, 1968. The purpose was to yield weighted average densities which would establish retroactively that the arithmetic average densities derived from the shippers' study were fairly representative of the densities of shipments actually moving in motor carriage. The second study is based on certain measurements and weighing conducted by five of the Board members at 59 carriers' terminals at 24 points in nine States. The hearing examiner criticized the carriers' study because the 59 terminals were not chosen by random sampling, and because the Board members who inspected the shipments used no systematic basis for selecting the shipments they inspected. Sometimes they weighed and measured only steel furniture shipments, and at others, due to lack of time, they did not inspect all the furniture shipments which went through a terminal in 1 day. The examiner also criticized the study because the inspections were not confined to interstate shipments and apparently were not confined to LTL shipments. In view of these deficiencies,

the examiner concluded that the weighted average densities derived from the carrier's study could not, in fact, be weighted, as represented by the Board. The density "formula" set forth in table 1 is not a part of the proposed schedules, although it is the basis for the ratings. With respect thereto, the examiner concluded that "* * * a necessary finding that the ratings under investigation are shown to be just and reasonable is unwarranted due to the failure of proof as to the lawfulness of the density formula; * * *."

DISCUSSION AND CONCLUSIONS

We agree with the examiner's analysis and conclusion regarding the shippers' study.

Most shippers refuse to release density data. However, the carriers should be able to obtain all the essential information from observation of their own operations. The carriers' traffic study based on data from their terminals would have been sufficient had that study been conducted in a manner warranting a conclusion that the results were reliable. We agree with the examiner that the study presented does not justify such a conclusion.

In a report in a rate structure investigation, *Furniture*, 177 I.C.C. 5, 109, the Commission prescribed the density formula for railroad less-than-carload ratings of furniture which appears below:

TABLE 3

Density (pounds per cubic foot)	*Less-than-carload rating (class)*
Less than 3	300
3.01 to 3.75	250
3.76 to 4.75	200
4.76 to 5.75	175
5.76 to 7.25	150
7.26 to 9.50	125
9.51 to 12.50	100
12.51 or more	85

In subsequent decisions involving motor carriage, cognizance has been taken of the difference between rail and motor transportation. Of particular relevance here is the following statement from *Incandescent Electric Lamps or Bulbs*, 44 M.C.C. 501, 512:

> In the light of the paramount importance of space in the determination of reasonable motor common carrier classification ratings, we are of opinion such ratings should be so arranged that, so far as practicable, as the densities of the commodities decrease, the revenues thereon should remain approximately equal; that the application of one rating to a group of commodities having too great a range in weight densities militates against this principle and that, therefore, there is need for much greater refinement in motor-carrier ratings than has heretofore been the rule in fixing classification ratings on freight moving by rail. What was done in *Furniture*, *supra*, we believe should guide us in these proceedings. Applying the same rating to commodities transported by motor carrier, ranging in density from less than 5 to 8.5 pounds a cubic foot, as has been done in the case of commodities moving by rail, clearly puts an undue burden on the heavier commodities and favors the lighter commodities by exacting lower charges thereon in relation to the space occupied.

The density formula in this proceeding attempts the refinement referred to in the above quotation. For example, the prescribed rail formula rated at class 300 all shipments with a density of 3 pounds per cubic foot or less, while the formula involved herein divides such shipments into two brackets with ratings of classes 300 and 350. The deficiency here is not with the formula per se, but in the lack of adequate underlying evidence to show that it was devised, not arbitrarily, but on a just and reasonable basis.

Without intending in any way to limit the evidence which carriers present, or to prescribe a sole method for producing evidence, in the remaining discussion we suggest certain guidelines for a traffic study of density.

Carriers' terminals and shipments[3] (100 percent selection for certain terminals and shipments is acceptable) should be selected by probability sampling which is sufficiently accurate to support a formula used as a basis for proposed classification ratings. In this connection, see *Motor Carrier Probability Sampling Studies*, 329 I.C.C. 683, which prescribed a probability study for the collection of various cost data and gave guidelines for the collection of the data. The carriers in the frame for the sample study should include all those interstate motor carriers which are parties to the National Motor Freight Classification, A-9, MF-ICC 9. Assuming that the ratings in question are to apply only on LTL shipments, the study should be so confined. The proper time frame should be a year in which random sampling should be used in the selection of days from the year on which to inspect the shipments at the selected terminals.

While not essential, stratification of the terminals, using a measure of size such as the average number of furniture shipments at a terminal, would be useful. Then the selection of terminals should be made at higher rates for the strata with the larger terminals. Also, the use of stratification by kind of furniture on which the density evidence is to be computed may give improved results. Sampling errors should be presented along with the final results for each of the important estimates. The sampling errors may be computed by standard methods or through the proper use of replication.[4] Because of the

[3] In lieu of shipments, the sample unit may be a freight bill, a truckload, or all the shipments on 1 day.

[4] Cochran, W. G., *Sampling Techniques*, 2d edition, John Wiley & Sons, Inc., 1963.

[Footnote continued on page 33a]

complexity of the sample study, a qualified sampling expert, working with specialists in the furniture classification field and the carriers' management, to properly develop the sample plan and execute the sample, would be helpful. For the presentation of the results of the study, reference is made to "Guidelines for Presenting Sample Studies," issued January 2, 1968, by the Commission's Bureau of Economics.

We suggest the following method of computing the density of several sample values, which involves the division of total weight by total volume. This method presupposes the use of stratified or stratified cluster sampling to reflect the selection of certain terminals of several carriers, and the selection of certain days of the year on which the sampling is to be performed. To illustrate the sampling method, we have chosen the commodity "beds and bed ends," as shown in the classification. If, at a certain terminal handling a large daily volume of traffic, it is decided to sample one out of five LTL shipments passing through that terminal on a certain day of the year, the first shipment is selected at random from among the first five shipments, and every fifth shipment thereafter. All sampled shipments not containing furniture are disregarded. The first sampled shipment of furniture, which contains beds or bed ends weighing 500 pounds and having a volume of 40 cubic feet, is recorded in table 4 below as a sample from that terminal. For convenience, we have listed in table 4 only one sample from each of six fictitious terminals.

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[4] [Continued]

Deming, W. E., *Sample Design in Business Research*, John Wiley & Sons, Inc., 1960.

Hansen, M. H., Hurwitz, W. N., and Madow, W. G., *Sample Survey Methods and Theory*, Volumes 1 and 2, John Wiley & Sons, Inc., 1953.

Kish, L., *Survey Sampling*, John Wiley & Sons, Inc., 1965.

TABLE 4

Identification number	Shipment sample values		Sampling rate	Sample weighting factor [1]	Weighted sample values	
	Pounds	*Cubic feet*			*Pounds*	*Cubic feet*
1	500	40	1/5	5	2,500	200
2	300	80	1/50	50	15,000	4,000
3	1,000	190	1/20	20	20,000	3,800
4	400	90	1/5	5	2,000	450
5	700	200	1/20	20	14,000	4,000
6	150	50	1/5	5	750	250
					54,250	12,700

[1] Sample weighting factor means the reciprocal of the overall sampling rate.

The weighting of the sample shipments shown in table 4 should be done as follows: For shipment 1, the sample weighting factor of 5 is multiplied by the weight of that sample, 500 pounds, and by the volume, 40 cubic feet, to obtain the weighted poundage of 2,500 pounds and the weighted volume of 200 cubic feet. The total weighted poundage of the six items, 54,250 pounds, divided by the total weighted volume, 12,700 cubic feet, equals a weighted density of 4.27 pounds. In a real traffic study, of course, there would be many samples at each selected terminal, and thus the weighted average density for beds and bed ends would be based upon a much greater sampling than that shown in table 4.

On reconsideration, we find that the proposed change in the National Motor Carrier Classification ratings on numerous articles of furniture, in LTL, are not shown to be just and reasonable.

COMMISSIONER TUGGLE, whom COMMISSIONER BREWER joins, concurring:

I concur in the conclusion of the majority insofar as it finds that the proposed changes in the National Motor

Carrier Classification ratings on numerous articles of furniture, in LTL, are not shown to be just and reasonable. However, I do not agree that this conclusion is warranted simply because of certain sampling deficiencies spelled out in the report. As I see it, the protestants have done much more than simply show that the respondents' density studies are inadequate because of the failure to use probability sampling therein. Rather, it seems to me, the protestants have actually rebutted the density data developed by the respondents' own methods and shown that in various instances the respondents' density data was affirmatively in error, and thus inadequate for justifying the rating changes based thereon. For example, in exhibits 160 to 162, the protestants offered their own rebuttal survey respecting wood and steel revolving chairs, knocked down, to show that the weighted average density of that article is over 7 pounds per cubic foot rather than less than 4 pounds per cubic foot as computed by the respondents. At that higher density, a rating of 125 would apply under the formula proposed here rather than the 250 rating which is proposed.

Accordingly, I would find that on the record before the Commission the respondents have failed to justify the changes in ratings proposed here as being just and reasonable.

COMMISSIONER DEASON dissents.

It is ordered, That the respondent motor carriers be, and they are hereby, notified to cancel the tariff schedules designated in the order of Division 2, Acting as an Appellate Division, entered in this proceeding on January 15, 1968, on or before December 18, 1970, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner pre-

scribed by the Commission under section 217 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[SEAL]

APPENDIX

Density.—Evidence submitted by the Board concerning the densities of the furniture articles under investigation is derived from two sources. The principal source, and the one relied on to ascertain the ratings under consideration, is data furnished to the Board directly or indirectly by furniture manufacturer's as briefly described hereinbefore. The other source of evidence is from a study made by members of the Board subsequent to the effectiveness of the ratings herein; such study will be described later.

The collection of data from furniture producers was admittedly not statistically based. There are more than 5,000 producers of household furniture, and an unspecified number of manufacturers of furniture for churches, theatres, stores, schools, and various business and professional offices. The Board was unaware of the number of furniture producers in total, or as to those who manufacture any particular category of furniture, and made no effort to determine such information before sending a questionnaire to 239 companies. The 116 producers who replied directly or indirectly in supplying the data used by the Board, not having been chosen by random sampling, are obviously not representative of the whole furniture manufacturing industry as to locations, volumes of production, or other relevant transportation matters. Although the basic reason for seeking density

data was a reassessment of LTL ratings for transportation by motor common carriers, the relatively few non-representative furniture producers who were surveyed were not asked concerning the volume of production of their furniture lines, nor the volume shipped in the service of respondents rather than by rail, trailer-on-flatcar, contract truckers, private carriage, the Railway Express Agency, or freight forwarders. Not having sought information concerning the volume of furniture moved by respondents, there was, of course, no query as to the amounts moved as truckloads rather than in LTL shipments. The densities so collected, unweighted and derived from sources not shown or likely to be representative, provide a weak and statistically unsound foundation for the use to which they were put by the Board, acting for respondents.

In applying a density formula such as that used by the Board, with increments of only a pound or 1.5 pounds separating the ratings, it is extremely important to use weighted average densities in order to prevent distortions which can be produced by the use of arithmetical averages. For example, based on data supplied by three producers the Board computed an arithmetical average density of 6.47 pounds for 29 models of steel pedestal desks; under the density formula a proposed LTL rating of class 150 was published on such desks. In comparison, the Steel Office Furniture Traffic Association gathered density data from 11 producers on a weighted average basis. Such density for steel pedestal desks was 7.21 pounds which would be rated class 125 for LTL under the density formula used by the Board. The failure of the Board to learn or attempt to discover the weighted average densities of furniture items is a substantial infirmity in its classification analysis.

It is apparent also that only the few producers who supplied density information to the Board, and those un-

known producers who manufacture the same types of furniture, are affected by this reclassification. Producers of other types of furniture who were not queried as to density, or who did not answer such query, escaped any change in the ratings on their products. The record does not afford a basis for judging whether this discrimination is undue and hence unlawful. Nevertheless it should be noted that the Board has not accomplished its original purpose, namely, a reassessment of the LTL ratings on furniture hauled by respondents. Only a partial reassessment, at best, has been completed, and the burden of increased ratings flowing from that uneven appraisal is not borne by numerous furniture manufacturers.

Of the 116 furniture producers who supplied information as to the densities of their products, 10 are located among the New England States. The proposed ratings do not apply on shipments moved within such States. No effort was made to secure information restricted to traffic which is transported beyond the border of the New England States on which the proposed ratings would apply. To the extent that the producers located in the New England States consign LTL in motor common carrier service within that area, the densities they supplied to the Board may not be representative of the traffic being moved by respondents under the proposed LTL ratings. The use of such densities could cause a bias in the arithmetical average densities computed by the Board and applied to its density formula.

The second source of density information shown herein is the actual measurement and weighing of furniture shipments at terminals of some of the respondents. These inspections were conducted by five members of the Board, three of whom testified as to the inspections they had conducted. These latter inspections took place, after the proposed ratings became effective, at 59 terminals of the respondents located at 24 points in nine States. The two

inspectors who did not testify herein made inspections in the same period at nine points in five States. There are 25 terminals at such points but it is not shown at how many terminals shipments were inspected. No information was obtained as to 12 of the furniture items under consideration, and the arithmetical average density of 17 other items fell within the same scale integer as that computed originally by the Board. As to the remaining items the arithmetical average density was lower in 24 instances in sufficient degree to have required a higher rating under the scale, and higher enough on six items to have required a lower rating.

The principal purpose of gathering density information after the proposed ratings were effective was to determine weighted average densities to be used in support of the classification charges made on the basis of arithmetical densities. Two methods were used by the inspectors to select furniture shipments to be measured and weighed at the terminals. Whenever possible, the inspectors looked at bills of lading before trucks were unloaded and selected those bills covering furniture shipments. The bills were given to the dispatcher who arranged for such shipments to be set aside on the docks to be weighed and measured by the inspectors. The other method of selection was to examine shipments lying on the dock, or moving by on draglines, to determine from the shape, size, or markings if it was a furniture shipment.

One of the protestants, the Outdoor and Casual Furniture Traffic League, contends that reference by the inspectors to the bills of lading, and taking information therefrom for use in this proceeding, is a violation of section 222(e) of the act because the consent of the shipper or consignee to disclose information on the bills was not obtained, and such information may be used to the detriment or prejudice of the shipper or consignee. No

claim is made that any shipper or consignee has suffered any detriment or injury, and it does not appear likely that any detriment or injury is now possible. The names of the manufacturers are not connected in the evidence to any shipment to a particular consignee or destination. No retailed facts of any possible value to a competitor were introduced of record by respondents, and it does not appear that section 222(e) has been violated.

The cities and terminals at which the inspectors determined densities were not chosen by a random sample. At some of the points the inspectors limited their inspections to shipments of steel furniture. At other points the inspectors did not have time to weigh and measure all of the furniture shipments passing through the terminals they visited on that day, either because the volume of traffic was too great or because they spent only a portion of the day at a terminal. The inspections were not limited to interstate traffic but intrastate shipments were included also. The shipments inspected may have been limited to LTL but this fact is not affirmatively established.

Weighted average densities were computed by the Board based on the data collected by the five inspectors. The specification of such densities as weighted average does not make them so in actuality. The aforesaid numerous deficiencies in the collection of the data relied on militates against the densities being a true reflection of the actual weighted average densities of furniture being moved by respondents in interstate commerce in LTL shipments. Nor do the arithmetical average densities generated from the inspections lend support or validate such densities as computed from data supplied by the 116 furniture producers. In fact the data gathered by the inspectors differ from, more often than it agrees with, the density information relied on as a basis for the proposed ratings. The inspections appear to have

been hurriedly conceived and were conducted in a hit-and-miss fashion. They did not result in the scientific accumulation of reliable information relative to the arithmetical or weighted average densities of the furniture articles under investigation.

On this record it cannot be found that the respondents have determined, or even tried to scientifically determine, the reliably accurate densities of the furniture items under investigation. In other words the respondents have not been successful in proving that the proposed ratings were justified because of the densities of the furniture articles they have classified and rated.